Nos. 80-1208, 80-1471, 80-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Supreme Court, U.S.
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NEW ENGLAND POWER COMPANY,

Appellant,

—v.—

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*

Appellees.

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Appellants,

—v.—

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL

Appellee.

DENNIS J. ROBERTS, II, *et al.*,

Appellants,

—v.—

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*,

Appellees.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits this brief *amicus curiae* in support of the captioned appeal by Appellant New England Power Company ("NEP") from a judgment of the New Hampshire Supreme Court entered on December 23, 1980, upholding the validity of a New Hampshire statute as

applied by the New Hampshire Public Utilities Commission ("PUC") to bar the exportation of hydroelectric energy generated within the state.[1]

INTEREST OF *AMICUS CURIAE*

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States.[2] Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. To serve these customers reliably, EEI's members are interconnected by a complex electrical network linking virtually all electric utilities, whether publicly or investor-owned.

This case concerns several issues of great importance to EEI's members, and to the general public, which is dependent upon reliable supplies of electricity.

First, the decision of the New Hampshire court allows that state to disrupt the comprehensive federal regulatory scheme for regulation of interstate wholesale power transactions. Since electrical facilities in all continental states, except Texas, are interconnected into networks or power pools, interstate power transactions are essential to EEI's members and to all other electric utilities because they ensure reliable and adequate service to all customers.[3] Nationally, there are approximately twenty-five power pooling groups, and all of the New England

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1 All active parties have consented to the filing of this brief *amicus curiae*. Letters from the consenting parties have been filed with the Clerk of this Court.

2 The positions expressed herein are those of EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein.

3 *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 471 (1972) (Douglas, J., dissenting); Federal Power Commission, *The 1970 National Power Survey*, Part 1, Chapter 17 (1970); *see Gainesville Util. Dep't v. Florida Power Corp.*, 402 U.S. 515, 519 (1971).

States are interconnected by a single network.[4] Transactions at wholesale among the interconnected systems are uniformly regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The decision below would empower a state to exploit interests in local energy supplies, and directly or indirectly restrict or bar interstate transactions. These parochial restrictions would disrupt the uniform regulatory system established by the FERC and relied upon by the members of EEI.

Second, the decision below allows an individual state to hoard its indigenous energy resources. The nation's basic energy resources—coal, oil, natural gas, uranium, and water power—are not uniformly distributed. The only energy source indigenous to New England generally, and New Hampshire specifically, is water power; coal, oil, natural gas, and uranium fuels used in New England are imported from other states or abroad. The decision below encourages other states to join New Hampshire in the practice of withholding energy resources so important to reliable energy supplies throughout the nation. Thus, the decision of the New Hampshire court is fundamentally antithetical to the notion of a federal union; it will encourage the very barriers to interstate commerce sought to be prevented by the commerce clause.

Third, the decision below interferes with the much-needed development of this nation's hydroelectric resources. Hydroelectric power is a dependable and renewable energy resource which now provides 11% of the electric generating capacity in the United States.[5] Approximately 28% of this

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4 Federal Energy Regulatory Commission, *1979 Annual Report* 43 (1980); *New England Power Pool Agreement*, Opinion 775 (FPC 1976), *aff'd*, *Municipalities of Groton v. Federal Energy Reg'y Comm'n*, 587 F.2d 1296 (D.C. Cir. 1979).

5 U.S. General Accounting Office, *Hydropower—An Energy Source Whose Time Has Come Again* 6 (January 11, 1980) [hereinafter cited as *GAO Hydropower Report*].

capacity, nationwide, is owned by investor-owned utilities.[6] Congress has long recognized the importance of hydroelectric power and, as a result of recent events, has facilitated the intensive development of hydroelectric power.[7] In the past year, there has been a tremendous surge of interest in developing this resource,[8] and a major effort by the FERC to facilitate that development.[9]

The potential hydroelectric resource is vast, but it is not evenly distributed among the states.[10] If it can be developed, hydroelectric capacity will be a major, and renewable, energy source for EEI's members and their customers. However, the decision below allows a state to create an artificial barrier to the development of this resource at precisely the time when Congress and the FERC have acted to remove barriers to its development.

In short, the decision of the New Hampshire court, if upheld, will encumber access to the nation's energy supplies

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6 *Id.* at 7.

7 The Federal Power Act, 16 U.S.C. §§ 791-824k (1976 & Supp. III 1979), was originally enacted in 1920 to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946). In 1978, Congress passed the Public Utility Regulatory Policies Act, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C. (Supp. III 1979)), which established incentives to develop hydroelectric resources, 16 U.S.C. § 824a-3 (Supp. III 1979); 16 U.S.C. §§ 2701-08 (Supp. III 1979). In 1980, Congress enacted the Energy Security Act, 94 Stat. 611 (codified in scattered sections of 7, 12, 15, 16, 27, 30, 50 U.S.C.A. (1981)), and increased these incentives in section 408 (codified at 16 U.S.C.A. §§ 2705, 2708 (1981)).

8 During the past year there has been a "dramatic increase" in the number of preliminary permit applications filed with the FERC. U.S. General Accounting Office, *Are Hydropower Licenses and Permits Being Issued Quicker Due to FERC's Streamlined Procedure*? 1 (October 24, 1980); *See* N. Y. Times, July 12, 1981, § 3 (Business), at 6-7.

9 *See, e.g.*, 46 Fed. Reg. 10165, 10166 (February 2, 1981); 46 Fed. Reg. 31902-03 (June 18, 1981).

10 *See GAO Hydropower Report* 9-17; Federal Energy Regulatory Commission, *1979 Annual Report* 56-7 (1980).

and will impair the ability of the nation's electric utilities to function reliably, efficiently, and economically to meet the electrical needs of all customers.

SUMMARY OF ARGUMENT

The decision of the New Hampshire court permitting the state to embargo the exportation of hydroelectric energy generated within the state, should be reversed. First, as applied, the statute upon which the state relies unduly burdens interstate commerce because it prevents the hydroelectric energy generated in New Hampshire from being made available in other states within the interconnected New England electric system. Second, the statute, as applied, is invalid under the supremacy clause because it conflicts with the Federal Power Act, which provides for a comprehensive scheme of federal regulation of sales of electricity at wholesale in interstate commerce and of the operation of federally-licensed hydroelectric projects. Finally, section 201(b) of the Federal Power Act cannot serve as a saving clause for the New Hampshire statute. As this Court has made clear by its earlier decisions involving the Power Act generally and section 201(b) specifically, New Hampshire was not exercising lawful authority when it acted to prohibit hydroelectric power exportation.

ARGUMENT

Acting pursuant to a New Hampshire statute, NH RSA 374:35 (the "New Hampshire statute"), the PUC withdrew permission for NEP "to transmit hydroelectric energy from within the boundaries of the State. . . ." (J.S. App. 40a).[11] The PUC claimed it acted to "regain" for New Hampshire consumers the economic benefit of hydroelectric energy generated within New Hampshire's borders. The PUC rationalized

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11 J.S. App. refers to the appendix to the Jurisdictional Statement in No. 80-1208. J.A. refers to the Joint Appendix in Nos. 80-1208, 80-1471, and 80-1610.

its action by noting that "[t]he public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources." (J.S. App. 35a). The New Hampshire court upheld this application of the statute in order "to enable New Hampshire to regain the benefit of its hydroelectric power." (J.S. App. 14a).[12]

This case involves three principles which are firmly established in this Court's jurisprudence. First, this Court has consistently, and as recently as this term, held that state attempts to interfere with interstate commerce violate the commerce clause. *Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981). Second, this Court has regularly rebuffed state attempts to disrupt the uniform federal regulation of both water power and interstate sales of electricity.[13] Third, this Court has rejected arguments that saving clauses in federal statutes authorize continuing jurisdiction under state statutes which burden interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

The decision below, upholding the application of the New Hampshire statute, conflicts with all of these established and recently affirmed principles. Therefore, the decision of the New Hampshire court should be reversed.

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12 The northern portion of the Connecticut River forms the boundary between New Hampshire and Vermont. *Vermont v. New Hampshire*, 289 U.S. 593, 619-20 (1933). It is a navigable waterway. *In re Bellows Falls Hydro-Electric Corp. and Connecticut River Power Co.*, 2 F.P.C. 380, 385 (1941). As a navigable interstate boundary, it is difficult to conceive of a river which is more inherently interstate in character. As such a river, it is certainly not a resource which belongs to the State of New Hampshire.

13 *See Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964); *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295 (1953); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946); and *Public Utils. Comm'n of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

A. New Hampshire's Prohibition of the Exportation of Hydroelectric Power Violates the Commerce Clause

The commerce clause of the Constitution grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. It has long been settled that the commerce clause is a restriction on permissible state regulation, which "prevents the states from erecting barriers to the free flow of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *see Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The commerce clause was drafted "to avoid the tendencies toward economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. at 325, which strained relations between the states under the Articles of Confederation, and which, as this case (and the companion consolidated cases) demonstrates, continue to do so today. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532-34 (1949). As this Court noted seventy years ago, the welfare "of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). The states "are not separable economic units" and cannot place themselves in " 'a position of economic isolation.' " *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 538 (quoting *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935)). This analysis, which is premised on the principle that "our economic unit is the Nation,"[14] is uniquely appropriate to this case, which involves the generation and transmission of electricity, because New Hampshire is not a separable unit electrically or economically.[15]

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14 *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949).

15 Forty-seven of the forty-eight contiguous states are electrically interconnected, and the interconnection of Texas with neighboring states is the subject of a pending FERC proceeding. *Central Power and Light Co., et al.*, FERC Docket No. EL79-8 (application filed Feb. 9, 1979). New Hampshire itself is part of a single centrally dispatched electrical network serving all of New England. *See New England Power Pool Agreement*, Opinion 775 (FPC 1976).

This Court has established a "virtually *per se* rule of invalidity" against state attempts to effect "simple economic protectionism" by statutes directly burdening interstate trade. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 624). "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624. Moreover, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* at 627. Nor may a state confine the benefit of its resources within the state, if its action impedes interstate commerce. *Hughes v. Oklahoma*, 441 U.S. at 335 n. 15.

As applied, the New Hampshire statute offends the very purpose of the commerce clause. It is not a mere impediment, but a total bar to interstate commerce. The New Hampshire statute, as applied, discriminates against interstate commerce: the intended effect of the PUC's application of the statute is to choke off interstate commerce in order to capture an economic benefit for New Hampshire residents. The PUC's rationale for its application of the statute is nothing more than an attempt to isolate New Hampshire from the national economy and to retain the entire benefit of a natural resource within the state.

New Hampshire can neither isolate itself in this manner nor hoard its resources. *Hughes v. Oklahoma*, 441 U.S. at 336-39; *Philadelphia v. New Jersey*, 437 U.S. at 623-25. This overt attempt to block interstate commerce at New Hampshire's borders is "simple economic protectionism." 437 U.S. at 624. As such, it is invalid *per se*.[16]

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16 It is only in cases in which a state statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" that a statute may be constitutionally valid, if it is narrowly drawn, and if the burden on commerce is justified by the local interest involved. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980). The New Hampshire statute, as applied, cannot meet even the threshhold test. It does not regulate evenhandedly;

(footnote continued on p. 9)

> It does not matter that the State has shut the article of commerce inside the State . . . [or] outside. . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

437 U.S. at 628. "What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!" *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 539.

The problem of costly and scarce energy supplies affects virtually every state in the nation. This application of the New Hampshire statute is an impermissible solution to that problem. As applied, this statutory provision violates the commerce clause.

B. The New Hampshire Statute, As Applied, Is Invalid under the Supremacy Clause of the Constitution Because it Conflicts with the Comprehensive Scheme of Federal Regulation Established by the Federal Power Act

When it prohibited the exportation by NEP of hydroelectric energy generated within the State of New Hampshire, the PUC intruded upon an area which has long been subject to exclusive control by the federal government. The licensing and development of water power has been controlled by the federal government since 1920, and sales of electricity at wholesale in interstate commerce have been subject to federal authority since 1935. *See* Federal Power Act, Part I, 16 U.S.C. §§ 791-823a (1976 & Supp. III 1979), and Part II, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The exercise of federal authority in this area leaves no room for New Hampshire to prohibit the exportation of hydroelectric energy as it has done in this case. Therefore, because it conflicts with the Federal Power Act, the

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(footnote continued from p. 8)

> rather it overtly discriminates against interstate commerce. Moreover, the local purposes are impermissible however they are described, either as an attempt at economic protectionism, or as an attempt to confer an exclusive right of access to a local natural resource.

New Hampshire statute, as applied, is invalid under the supremacy clause.

The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. As this Court stated last term, "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 49 U.S.L.W. at 4568.

It is manifest that the New Hampshire statute, as applied, violates Parts I and II of the Federal Power Act. *Id.*; *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Part I of the Federal Power Act requires the licensing of all hydroelectric projects located on navigable waters, and of all such projects on non-navigable waters if "the interests of interstate or foreign commerce would be affected. . . ." Federal Power Act, § 23(b), 16 U.S.C. § 817 (1976). This standard draws upon Congress's "full authority under the Commerce Clause." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 96 (1965). Part I further provides that all licenses issued pursuant to it be on the condition, *inter alia*, that the project "be best adapted to a comprehensive plan . . . for the use or benefit of interstate . . . commerce. . . ." Federal Power Act, § 10(a), 16 U.S.C. § 803(a)(1976). As this Court held thirty-five years ago, Part I was enacted to establish "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946) ("First Iowa").

"The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. As applied, the New Hampshire statute is unquestionably a conflicting state control. Despite the fact that the NEP hydroelectric projects are licensed on the condition

that they benefit interstate commerce,[17] New Hampshire has prevented the electric output of those projects from entering interstate commerce. In short, as applied, the New Hampshire statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Notwithstanding the obvious conflict between the New Hampshire statute and Part I of the Federal Power Act, the New Hampshire court found that the New Hampshire statute is not preempted because compliance with it is not a condition precedent to securing a federal license and because New Hampshire has not sought to block hydroelectric development on the Connecticut River. (J.S. App. 5a).

This reasoning is fallacious. First, New Hampshire has not sought to block these licenses or impose conditions on their issuance because it has no power to do so. *See First Iowa*, 328 U.S. 152 (1946). Second, regardless of how they are characterized by the New Hampshire court, New Hampshire's actions are tantamount to an attempt to block hydroelectric development on the Connecticut River. The projects were licensed by the federal government on condition that they benefit interstate commerce. New Hampshire has prohibited fulfillment of that condition, thereby interfering both with compliance with the project licenses and with accomplishment of the underlying purpose of the hydroelectric development. From the perspective of the federal interest in interstate commerce, the New Hampshire statute has the same effect as an effort to block development *ab initio*. Neither is permissible. The State concedes that it has no power to condition issuance of the federal license in the first place. It is no more permissible for New Hampshire to obstruct NEP's ability to comply with a valid condition of its federal license. Thus, the New Hampshire statute, as applied, conflicts with Part I of the Federal Power Act and violates the supremacy clause.

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17 *See, e.g., Connecticut River Power Co.*, 11 F.P.C. 751, 754 (1952).

Part II of the Federal Power Act provides for FERC jurisdiction to regulate the interstate transmission and wholesale sales in interstate commerce of electric energy. Federal Power Act, § 201, 16 U.S.C. § 824 (1976 & Supp. III 1979). In 1927, this Court held that the states have no power to regulate sales such as NEP's sales at wholesale. *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("Attleboro"). Congress responded by enacting Part II of the Federal Power Act:

> Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.

United States v. Public Utilities Commission of California, 345 U.S. 295, 311 (1953). FERC jurisdiction over such sales is plenary.[18] *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964) ("*City of Colton*"). Therefore, New Hampshire has no power to regulate wholesale sales of electricity. It cannot directly or indirectly regulate the rates for such sales. *United States v. Public Utilities Commission of California*, 345 U.S. at 311.

Although NEP's sales of hydroelectric energy are clearly and admittedly wholesale sales in interstate commerce, the New Hampshire court found that the PUC's use of the New Hampshire statute to regulate these sales was not preempted by Part II of the Federal Power Act. (J.S. App. 3a). Striving to elude the comprehensive regulatory scheme established by Part II, the New Hampshire court stated: "This is not a control of rates but rather a control of the assignment of the power." (J.S. App. 12a).

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18 The only exception to this plenary grant of jurisdiction is for sales "made explicitly subject to regulation by the States." *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 216 (1964). As discussed at pages 15 to 17 *infra*, no such explicit exception exists in this case.

The New Hampshire court's characterization of the PUC's action as something other than wholesale ratemaking is wholly unconvincing. Indeed, the New Hampshire court was itself apparently unconvinced and could not ignore the reality of the PUC's application of the New Hampshire statute:

> Its [the New Hampshire statute] purpose is to give New Hampshire the benefit of that power of which its residents now get only about six percent.
>
> . . .
>
> The PUC concluded that hydroelectric power is cheaper to the extent of approximately $25 million a year. . . . [T]he Public Service Company of New Hampshire's rate per kilowatt hour exceeds [NEP's] rate by about 25 percent. . . . Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this state, would be substantial.

(J.S. App. 11a-14a). Despite the prohibition on state regulation of wholesale rates, directly or indirectly, the New Hampshire court set aside its illusory distinction between "assignment" of power and ratemaking and remanded the entire matter for NEP to make appropriate wholesale rate filings to the FERC to implement the New Hampshire statute. (J.S. App. 14a).

New Hampshire's use of its statutory provision to require NEP to file new wholesale rates reflecting a reduced cost base foisted on NEP by state fiat, is a "substantial usurpation" of the FERC's ratemaking authority. *Maryland v. Louisiana*, 49 U.S.L.W. at 4569. It is nothing more than an impermissible attempt to accomplish by indirection what the state is powerless to achieve directly. Thus, the New Hampshire statute, as applied, also conflicts with Part II of the Federal Power Act and violates the supremacy clause of the Constitution.

C. The Saving Clause of the Federal Power Act Does Not Permit New Hampshire to Embargo the Export of Energy to Other States

The New Hampshire court virtually conceded that, standing alone, the New Hampshire statute, as applied, would violate both the supremacy clause and the commerce clause of the United States Constitution. (J.S. App. 5a, 10a-11a). However, the New Hampshire court concluded that a limited saving clause contained in section 201(b) of Part II of the Federal Power Act recognized the New Hampshire statute as "valid and lawful" and was "specifically intended" to allow New Hampshire "to interdict" the flow in interstate commerce of electricity generated at NEP's federally licensed hydroelectric plants. (J.S. App. 8a, 10a).

Section 201(b) of the Federal Power Act provides, in relevant part:

> The provisions of this subchapter [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

16 U.S.C. § 824(b) (Supp. III 1979). This language was inserted at the request of a New Hampshire congressman concerned lest New Hampshire lose its then existing rights over the exportation of hydroelectric energy "produced up there in the granite hills of old New Hampshire." 79 CONG. REC. 10527 (1935). However, nothing in section 201(b) or elsewhere in the Federal Power Act permits the degree of interference with interstate commerce and with administration of the Federal Power Act which the New Hampshire court has condoned in this case.

In a recent decision, this Court interpreted a saving clause strikingly similar to section 201(b) and explicitly rejected arguments that the burdensome effects of a state statute on interstate commerce were authorized by that saving clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 49.

This Court held that although the saving clause, section 7 of the Bank Holding Company Act of 1956,[19]

> does reserve to the States a general power to enact regulations applicable to bank holding companies . . . nothing in its language or legislative history . . . support[s] the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law. . . . We therefore conclude that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause.

Lewis v. BT Investment Managers, Inc., 447 U.S. at 48-49. This reasoning, which invokes both the supremacy clause and the commerce clause, is directly applicable to the instant case. By parallel reasoning, the New Hampshire statute, as applied, clearly violates both constitutional provisions, and New Hampshire's attempt to carve out exceptions to the Federal Power Act cannot be supported by the limited saving provisions of section 201(b).

In 1935, when Part II, which includes section 201(b), was enacted, the jurisdiction of the Federal Power Commission ("FPC", now the Federal Energy Regulatory Commission) was not completely defined. Since then, this Court has explored in several cases the scope of federal jurisdiction under the Federal Power Act. In those cases, this Court has consistently rejected

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19 Section 7 provides:

> The enactment by the Congress of this chapter [the Bank Holding Company Act of 1956] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has *or may hereafter have* with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846 (1976) (emphasis added). In contrast to section 7 of the Bank Holding Company Act, section 201(b) of the Federal Power Act limited the state's powers to "lawful authority *now* exercised."

state attempts to carve out exceptions to federal authority under Parts I and II of the Federal Power Act.

In the 1946 *First Iowa* case, this Court held that section 9(b) of the Power Act, 16 U.S.C. § 802(b) (1976), which refers to compliance with state laws, does not allow the states to impose conditions on the issuance of licenses under Part I of the Act.[20] 328 U.S. at 181. In 1953, this Court refused to allow California to rely upon the saving clauses in section 20 of Part I, 16 U.S.C. § 813 (1976), and section 201(a) of Part II, 16 U.S.C. § 824(a) (1976), to regulate rates in interstate commerce. *United States v. Public Utilities Commission of California*, 345 U.S. at 304-06, 309-11. Significantly this Court there noted that section 201(b) "certainly does not go beyond . . . § 201(a) . . . in limiting federal authority." 345 U.S. at 300 n. 4. Finally, in 1964 this Court rejected California's argument that section 201(b) allows state regulation of wholesale rates in interstate commerce and stated that

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

City of Colton, 376 U.S. at 215-16.

Section 201(b) did not create an exception to the detailed and pervasive scheme articulated by the Federal Power Act and elaborated by the decisions of this Court. Unlike other saving

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20 The Court further noted that Part I leaves to the states their "traditional jurisdiction" subject to Congress's superior authority to control interstate commerce. 328 U.S. at 171. The Court noted that section 27 of the Power Act, 16 U.S.C. § 821 (1976), which expressly saves state water laws from preemption, is "especially significant" in this regard. In the context of this case, section 27 is especially significant because its saving provisions are in no way qualified as are those in section 201(b). *See* text at 16-17.

provisions contained in the Federal Power Act,[21] Congress qualified section 201(b) in two respects by limiting its reach to "lawful authority now exercised." First, by requiring that the state authority be "lawful", Congress ultimately relied upon this Court to determine what was permissible under the supremacy clause and the commerce clause. *c.f. United States v. Public Utilities Commission of California.*, 345 U.S. at 303. Second, by referring to "authority now exercised," Congress focused on the regulatory and factual setting existing in 1935.

Turning first to the lawfulness of New Hampshire's attempt to regulate, section 201(b) does not authorize the PUC's application of the New Hampshire statute to prevent NEP from exporting energy generated at its federally-licensed hydroelectric projects on the Connecticut River. First, by its terms, section 201(b) applies only to Part II of the Power Act. Therefore, it does not permit New Hampshire to interfere, as that state has done here, with NEP's compliance with Part I of the Power Act by imposing state controls conflicting with the conditions in licenses issued under the Power Act. Second, this Court has held that section 201(b) does not authorize state rate regulation. *United States v. Public Utilities Commission of California*, 345 U.S. at 300-01 n.4. Therefore, section 201(b) does not allow New Hampshire to regulate wholesale rates in interstate commerce as it has attempted to do here by controlling the "assignment" of power and by requiring NEP to modify its federally-approved tariffs. In short, section 201(b) does not authorize the instant application of the New Hampshire statute.

The fact that section 201(b) does not authorize the instant application of the New Hampshire statute is a reflection of the major changes which have occurred in the electric industry during the forty-six years since Part II was enacted. *Id.* at 302. In 1935, when it enacted Part II, Congress also amended section 23(b) of Part I to give the FPC jurisdiction over

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21 *See* Section 27 of Part I of the Federal Power Act, 16 U.S.C. § 821 (1976).

hydroelectric projects to be constructed on non-navigable streams if those projects affected interstate commerce. 16 U.S.C. § 817. Therefore, in 1935, Congress contemplated the continued existence of a class of hydroelectric projects which would remain unlicensed because they would be located on non-navigable waters and would not affect interstate commerce. It was regulation over exportation of energy from this category of project alone which section 201(b) could, at that time, have rationally preserved for the states under Part II.

In 1935, only four of NEP's present six projects on the Connecticut River had been constructed. At that time, the portion of the Connecticut River which forms the Vermont-New Hampshire border was not considered to be navigable. *In re Bellows Falls Hydro-Electric Corp. and Connecticut River Power Co.*, 2 F.P.C. 380 (1941). Therefore, when section 201(b) was enacted, it could have applied to state regulation of the export of energy from projects then located on the Connecticut River.

However, the situation has changed drastically since 1935. In 1941, the FPC determined that the Connecticut River was navigable, and required licenses for hydroelectric projects located on the River. *Id.* at 385; *see Connecticut River Power Co.*, 10 F.P.C. 1255, 1257 (1951). Between 1935 and 1956, two new NEP projects were constructed on the Connecticut River. (J.A. 19a). These two projects have a total capacity of 217MW, which is more than half of the generating capacity at issue in this case. (J.A. 21a). By 1952, all hydroelectric projects on the River were licensed.[22] Moreover, in 1965, this Court determined that section 23(b) requires the licensing of hydroelectric projects located on non-navigable streams if electric energy from those projects flows in interstate commerce. *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965).

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22 *Connecticut River Power Co.*, 11 F.P.C. 751, 754 (1952); *In re Bellows Falls Hydro-Electric Corp.*, 5 F.P.C. 271 (1946); *Connecticut River Power Co. and New England Power Co.*, 4 F.P.C. 670 (1944); *Bellows Falls Hydro-Electric Corp. and Olcott Falls Co.*, 4 F.P.C. 3 (1943); *Bellows Falls Hydro-Electric Corp.*, 3 F.P.C. 699 (1942).

Therefore, as early as 1941, and certainly by 1965, section 201(b) no longer had any possible application to energy exported from projects on the Connecticut River, such as the six NEP projects at issue here.[23]

Moreover, in section 201(b), the clause "lawful authority *now exercised*" limited the State's jurisdiction over hydroelectric power to that being exercised at the time the Federal Power Act was enacted. Even though New Hampshire was *exercising* its jurisdiction over non-navigable waters in 1935, it had applied its statute only to permit, and not to prohibit, export of hydroelectric energy. (J.S. App. 26a-27a). Section 201(b), which arguably saved "authority *now* exercised", cannot serve as a saving clause for the New Hampshire statute as New Hampshire now seeks to apply it—to prohibit export of hydroelectric energy.[24]

With these contractions of the residuum of state jurisdiction, nothing has been left to the states under the Federal Power Act except what has been expressly legislated by Congress. *City of Colton*, 376 U.S. at 216. While the New Hampshire statute might retain some utility in matters of very local concern, section 201(b) cannot save the statute in this case.

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23 To the extent that section 201(b) may have had a broader reach in 1935, this breadth assumed the existence of state powers which later decisions of this Court have shown not to exist. *See United States v. Public Util. Comm'n of Cal.*, 345 U.S. at 304.

24 Since two of these projects did not exist in 1935, section 201(b) could not conceivably apply to them because New Hampshire then exercised no authority over them.

CONCLUSION

For the foregoing reasons, the decision of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

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